



U.S. Small Business  
Administration

Avoiding a Size Protest



Host



Presenter

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know the  
**rules!**

# Topics Covered

- **UNDERSTAND YOUR SIZE STATUS**
  - **Size**
    - Size standards/NAICS Codes
    - *Nonmanufacturer Rule* (NMR)
  - **Affiliation**
    - Types of affiliation
    - Joint Ventures
    - Ostensible subcontracting
    - Mentor-Protégé programs
- **SIZE PROTEST TRIGGERS**

# What is a Small Business?

1. **Organized for profit**
2. **Place of business in the U.S. that operates primarily in the U.S. or makes a significant contribution to the U.S. economy**
3. **Each NAICS has a receipts-based OR employee-based small business size standard**



13 CFR § 121.105

# SBA Size Standards



236220	Commercial and Institutional Building Construction	\$39.5
541310	Architectural Services	\$8.0
541320	Landscape Architectural Services	\$8.0
541412	Computer Systems Design Services	\$30.0
562910	Environmental Consulting Services	\$16.5
332322	Sheet Metal Work Manufacturing	500
541715	R&D in Physical, Engineering & Life Sciences	1000
	Aircraft, Aircraft Engine, and Engine Parts	1500

[www.sba.gov/tools/size-standards-tool](http://www.sba.gov/tools/size-standards-tool)

# Average Annual Receipts (AAR)

- ❑ Use Federal Tax Returns (not financial documents)
- ❑ “Cost of Goods Sold” plus “Total Income”
- ❑ Average of last three (or five) completed fiscal years

## Number of Employees

- ❑ Count all individuals employed on a full-time, part-time, or other basis.
- ❑ Numbers of employees for each of the pay periods for the preceding, completed 12 calendar months.

### Few Exclusions- - 13 CFR § 121.104(a)

- ❑ proceeds from transactions between a concern and its affiliates

# As of What Moment is Size Determined?

On the date the offeror submits its written self-certification that it is small to the procuring activity as part of its initial offer (or other formal response to a solicitation) which includes price.

13 CFR §121.404(a)



## Multiple Award Contracts –

- ▶ small at the time of offer for the MAC,
- ▶ small for each order issued against the contract,
- ▶ unless a contracting officer requests a new size certification in connection with a specific order

13 CFR 121.404(a)(1)

# Can a firm's size change during performance?

Small for the life of that contract (including options) unless recertification is requested/required.

13 CFR §121.404(g)



## Recertification required:

- ▶ Novation
- ▶ Merger/Acquisition
- ▶ Contract with duration over 5 years (recertify before the end of the fifth year **and** every time an option is exercised thereafter)

13 CFR §121.404(g)



# Manufacturing Contracts

- ▶ On a **small business set-aside** contract, the offeror must be the Manufacturer or meet the requirements of the NonManufacturer Rule
- ▶ Not applicable to small business set-asides between the MPT and the Simplified Acquisition Threshold (SAT)
  - IS APPLICABLE TO SBSAs over the SAT
  - IS APPLICABLE TO SOCIO-ECONOMIC SBSAs of any dollar level
- ▶ Applies to orders off GSA Schedule if they are set-aside for small business
- ▶ Has to be self-performed by the offeror themselves (not an affiliate)

13 CFR § 121.406

# Non-Manufacturer Rule (NMR)

If a procurement is set-aside for small business and has been assigned a manufacturing or supply NAICS code, the small business offeror must:

- ▶ (i) have **less than 500** employees;
- ▶ (ii) be **primarily engaged** in the retail or wholesale trade and **normally** sells the type of item being supplied;
- ▶ (iii) take **ownership or possession** of the item(s) with its personnel, equipment or facilities in a manner consistent with industry practice; and
- ▶ (iv) supply the **end item** of a small business manufacturer made in the United States **OR** obtain a waiver of such requirement...

Waivers (waive subsection (iv) only) may be either class or individual and must be in place **before** receipt of offers. See procedures in 13 CFR §121.1204. Class waivers publicized on SBA's website. Individual waivers must be announced in solicitation. 13 CFR §121.406(b)(1)

# AFFILIATION



# Two Types of Affiliation

## ▶ General

- On-going basis



## ▶ For a Specific Procurement

- Joint venture
  - Affiliated only for the contract at hand

# AFFILIATION

## THE KEY TO SIZE IS AFFILIATION

A concern's size always includes the size of all of its domestic and foreign affiliates.

13 CFR §121.103(a)(6)

## THE KEY TO AFFILIATION IS CONTROL

“Concerns are affiliated...if one concern **controls or has the power to control** the other, or a third party has the power to control both.”

13 CFR §121.103(a)(1); FAR §19.101

# Affiliation Factors

## GENERAL

- ▣ Common ownership
- ▣ Common management
- ▣ Identity of Interest (family members, pattern of common investments, dependence through contractual relationships)
- ▣ Newly Organized Concern

## CONTRACT SPECIFIC

- ▣ Joint Ventures/Teaming

# **Is a Teaming Agreement a Joint Venture or a Prime/Subcontractor Relationship?**

Can be either

# Prime / Subcontractor Relationship

- ▶ A potential **prime contractor** agrees with one or more other companies to have them act as its **subcontractors** under a specified Government contract





# Joint Ventures (JV)



- JV must be in writing and registered in SAM
- Organized for a specific and limited purpose
- Each joint venture member must qualify as small for the NAICS code assigned to the procurement

SB1 (\$7 million ) + SB2 (\$4 million)  
Size Standard \$10 million

13 CFR § 121.103(h)

## 8(a) Mentor–Protégé JVs

A joint venture formed by an SBA-approved mentor and 8(a) protégé (per §124.520) may bid on a federal procurement as a small business concern **if** the protégé is small....

13 CFR §121.103(h)(3)(iii)

### **SBA must:**

- ✓ approve both mentor-protégé and JV Agreements (on 8a set-asides - 13 CFR 124.513(c)).
- ✓ written SBA approval of M/P Agreement must be given before **offer**
- ✓ written SBA approval of JV Agreement must be given before **award**

# “All Small” Mentor–Protégé JVs

A joint venture submitted by an SBA-approved mentor and protégé may bid on a federal procurement as a SBC **if** the protégé is small....

13 CFR §121.103(h)(3)(ii)

SBA must:

- ✓ Approve the M/P agreement before **offer**

**While SBA does not review the JV Agreement, it must still meet the requirements of a Joint Venture Agreement and will be evaluated if there is a size protest. 13 CFR 125.9(e)**

# Ostensible Subcontracting

A subcontractor is an ostensible subcontractor if:

- ☐ The subcontractor performs the **primary and vital requirements**, or
- ☐ The prime contractor is **unduly reliant** upon the subcontractor.

Treated as a Joint Venture

# SIZE PROTESTS

# Who can submit a size protest?

## Small business Set-aside or Unrestricted Contract:

- ▶ Another offeror
- ▶ the Contracting Officer
- ▶ the SBA Area Director

## Continuing 8(a) Eligibility:

- ▶ The 8(a) firm
- ▶ SBA AA/BD

## SAM Registration:

- ▶ SBA Area Director

## Competitive 8(a) Set-Aside Contract:

Another offeror

The Contracting Officer

The SBA District Director or the AA/BD

## 8(a) Sole Source Contract:

The 8(a) firm

The Contracting Officer

The SBA District Director or the AA/BD

# Timeliness, Specificity and Standing

- ▶ CO must receive a written protest five business days after
  - (i) notification to unsuccessful offerors (RFPs/RFQs)
  - (ii) bid opening (IFBs)

13 CFR §121.1004; FAR §19.302(d)

- ▶ A protest must contain “specific, detailed evidence to support the allegation that the offeror is not small.”

FAR §19.302(c)(2); 13 CFR §121.1007

- ▶ Protester must have standing to protest or will be dismissed

13 CFR 121.1001

# PROTEST TRIGGERS

- **Public Image**
  - FPDS, FedBizOpps, USA Spending, Bloomberg \*\*
  - News Releases
  - Website (overuse of word “Affiliate”)
  - Promotion of dominant customers
  - Family members in same line of business
  - Don’t call your customers your affiliates
  - Don’t overinflate your size/contract awards
- **Size Recertification – long term contracts/mergers/acq.**
- **GSA Schedules**
- **JOINT VENTURES**
  - All Small MPP listed on website
  - 8(a) MPPs – not on a website
  - How do they know your JV partner is your Mentor? \*\*





**QUESTIONS?**

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[www.sba.gov/feedback](http://www.sba.gov/feedback)

**Thank you**